

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 384 OF 1995

The State of Maharashtra.] .. Appellant

Vs

Shri Shankar Shivaji Phalake,]
Age: Major, R/o. Satara Road,]
Tal. Koregaon, Dist: Satara.] .. Respondent

Mr. D.P. Adsule, A.P.P., for the appellant - State.

Mr.S.V. Kotwal holding for Mr. M.S. Mohite for the respondent.

**CORAM: S.S. PARKAR &
ANOOP V. MOHTA, JJ.**

DATED: 6TH MAY, 2005

ORAL JUDGMENT. : [Per Anoop V. Mohta, J.]

1. The State of Maharashtra has preferred this Appeal against the impugned order of acquittal dated 7th July, 1994, passed by the 4th Additional Sessions Judge, Satara, whereby, accused-respondent was acquitted of the offence punishable under Section 302 of the Indian Penal Code (for short "IPC").

2. On 24th July, 1988, at about 6.30 p.m., when Chabutai (PW1) was watching television in the room of

Phalke Chawl, situated at Satara Road, along with her son Shivaji (PW3), her brother Ravindra (hereinafter referred to as "the deceased") came shouting that the son of one Phalke beat him in the house of Panditbai who was residing in the same locality. PW1 and PW3 and the deceased went together towards the house of the said Panditbai. The deceased started shouting and calling the said Panditbai from the ground floor. In response to that, the accused-Shankar came out of the house of Panditbai. PW1 asked Panditbai about the assault to Ravindra. She denied the said assault and, therefore, the deceased started abusing Panditbai. The accused immediately thereafter, came down on the ground floor and threatened to kill the deceased as he had abused Panditbai. He lifted the deceased and threw him on the ground on the stone. The deceased sustained bleeding injuries near the right eyebrow, on the head. The blood was oozing. PW1, therefore, took the deceased and the accused to the Police Station, Satara Road. PW3 - Shivaji, PW6 - Ramchandra and one Shankar s/o Jagannath Phalke followed them. The statement of the injured deceased was recorded by the Police Head Constable Kumbhar (PW7) and N.C. case was registered under Section 323, 504 of IPC. The accused Shankar was given in custody to the Police. The injured deceased was then taken to the nearby hospital. The doctor was not

present there. PW1 again returned to the Police Station. The victim firstly was brought to the Civil Hospital, Satara, on the same night at about 10.00 p.m. where he was admitted. The doctor of the Civil Hospital, Satara advised to shift the injured deceased to Ruby Hospital, Pune, as the brain injury was serious. The deceased was taken to Sassoon Hospital and thereafter to Ruby Hospital, but was brought back to Sassoon Hospital. The deceased succumbed to the head injury on 25th July, 1988, at 7.30 a.m. in Sassoon Hospital, Pune.

3. On 27th July, 1988, PSI Ramesh Mohite (PW8) of Koregaon Police Station filed complaint, after receiving the information from Bund Garden Police Station about the death of the deceased. Crime No.88 of 1988 was registered (Exh.36). The matter was investigated by PW8. The Panchanama of the scene of offence was recorded by him (Exh.10). He arrested the accused on 27th July, 1988, at 9.00 p.m. PW9 API Kamble in the further investigation recorded some supplementary statements. The last Investigating Officer PSI Kharade submitted the charge-sheet against the accused on 12th September, 1990, under Section 302 of the IPC. The accused denied the charges and pleaded not guilty. His defence was of total denial and false implication. The

prosecution examined 10 witnesses. The defence did not examine any witness.

4. PW1 - Chabutai; PW3 - Shivaji; PW5 - Balu and PW10 - Dilip, as per the prosecution, are the eye witnesses of the incident. The other eye witnesses PW2 - Vikas and PW4 - Indubai turned hostile. PW6 - Ramchandra is the brother of the deceased; PW7 - Hambirao Kumbhar - Police Head Constable (PHC); PW8 - Ramesh Mohite - PSI and PW9 - Maruti Kamble are the Police personnel. The prosecution placed on the record, the documentary evidence like Inquest Panchanama (Exh.7); Death Certificate (Exh.8); Scene Panchanama (Exh.10); Seizure Panchanama of the stone from the scene of the offence (Exh.12); Panchanama of the clothes of the deceased (Exh.14); Post Mortem Notes (Exh.15); the Arrest Panchanama of the accused (Exh.16); the Injury Certificate of the deceased issued by the Medical Officer, General Hospital, Satara (Exh.17); the Chemical Analyzer's Certificates (Exhs.18 & 19); the map of the scene of offence (Exh.21) and the photographs of the scene of offence and same were admitted by the defence in response to the application under Section 294 of the Criminal Procedure Code (for short "Cr.P.C.").

5. The learned Judge, after considering the material and the proved documents on the record, held that the death of the deceased was homicidal. However, it is held that the prosecution failed to prove that the accused-respondent committed the murder. Therefore, the learned Judge passed the order of acquittal in question.

6. Heard the learned A.P.P. Mr. D.P. Adsule for the appellant-State and the learned counsel for the respondent Mr. S.V. Kotwal. We have gone through the record in extenso. We have noted the respective submissions made by the counsel for the parties.

7. There is no contest so far as the homicidal death of the deceased is concerned. The P.M. Notes (Exh.15) supports the reasoning of the learned Sessions Judge that the cause of death was "shock as a result of fracture of the skull with intravenial haemorrhage and laceration to the brain." The blood stained clothes of the deceased (Exh.14) and Injury Certificate (Exh.17) further indicate that the deceased was examined by the Medical Officer of the General Hospital, Satara on 24th July, 1988, at 11.35 p.m. Even though no blood stains were detected on the stones seized from the scene of offence (Exh.12) and no Medical Officer was examined, but these documents supports the prosecution case and

the reasoning given by the learned Judge that the death of Ravindra was homicidal.

8. The statement - dying declaration (Exh.32) dated 24th July, 1988, made by the deceased to PW7 is strongly relied upon by the learned A.P.P. who contended that there are eye witnesses who support this dying declaration. Therefore, the order of acquittal is not correct. The learned Advocate appearing for the respondent-accused, however, resisted the same. He contended that the order of acquittal passed is correct, as based upon the evaluation and assessment of the evidence on the record, apart from innumerable discrepancies and contradictions in the evidence, as well as, in the said dying declaration itself. The infirmities nowhere support the prosecution case and, therefore, the view taken by the learned Judge was plausible and reasonable view. There is no perversity in the order. Therefore, no case has been made out by the prosecution to interfere with the impugned order of acquittal.

9. As per the prosecution, the dying declaration (Exh.32) was recorded by the Police Head Constable Kumbhar (PW7), but scribed by other. The dying declaration (Exh.32) dated 24th July, 1988, made by the

deceased to PW7 at about 7.30 p.m. on 24th July 1988, when Chabutai (PW1) and the deceased Ravindra came to the Police Station followed by Shivaji, Ramchandra, the accused Shankar and constable Sawant. He dictated the statement as per the deceased's narration (Exh.32). As per the version of the deceased, when he was standing on the road near the Shubharambh Housing Colony at about 7.15 p.m. in front of his house, the accused came on cycle and asked the deceased as to why he was standing in the rain. To that, the deceased retorted by saying "*What you have to do with this?*". Thereafter, the accused started abusing and beating him. The accused, in anger, lifted the deceased and threw him on the ground. The deceased got injured on his head and he fell down on the stones lying there. Blood was oozing. As per the version of the deceased, his sister Chabutai separated him and took him to the hospital. The thumb impression of the deceased was taken on the statement (Exh.32). There are no other endorsements on this dying declaration. Such dying declaration needs further corroboration from the eye witnesses and/or any other corroborative evidence to link the involvement of the accused. No order of conviction can be passed unless such dying declaration is corroborated and supported by other material evidence. In the present case, as per the prosecution itself, there are four eye witnesses in

this matter whose statements were also recorded on 27th July, 1988 itself, specially of PW3, PW4, PW5 and PW6. The statements of the main eye witness PW1 Chabutai and PW2 Vikas were recorded on the day of the incident itself. The learned Judge, after considering the testimony of all these eye witnesses and other important witnesses, came to the conclusion that it is difficult to believe the prosecution witness and the prosecution case.

10. As noted, on 27th July, 1988, after the death of the accused, Ramesh Mohite (PW8) PSI, Koregaon Police Station, lodged a Report on behalf of the State (Exh.36), based upon which the offence vide C.R.No.88 of 1988 under Section 302 of the IPC was registered. The matter was thereafter handed over to the Crime Branch, Satara, on 11th August, 1988. There is no reference in Exh.36 about the dying declaration in question i.e. Exh.32. Even though there is a reference of registration of N.C. No.313 of 1988 under Section 323 and 504 of the IPC. As per this Report (Exh.36), there is no mention about the fact that the accused lifted the deceased and threw him on the ground or compound wall. As per this Report, on 27th July, 1988, at about 7.15 p.m., the deceased got injured as accused assaulted him during the quarrel. This report is also in variance

with the so-called dying declaration of the deceased. More than that, what is missing is the reference to the said dying declaration itself which was recorded at Satara Police Station by one constable Sawant as per the dictation of PW7 Kumbhar. The said scribe was not examined by the prosecution.

11. Chabutai PW1, the sister of the deceased, went to Satara Police Station along with the injured deceased and PW3 - Shivaji her son and accused Shankar. This important witness nowhere stated in her testimony that such dying declaration was recorded in the said Police Station. Her statement was recorded on 27th July, 1988, for the first time by PSI Mohite. PW3 - Shivaji, who went along with the deceased and PW1 to the Police Station nowhere made reference to any such dying declaration recorded or made by the deceased. PW6 - Ramchandra, the brother of the deceased and PW1 - Chabutai had also gone to the Police Station along with the deceased. Again, there is no reference made to such dying declaration recorded in the Police Station. This background and the uncorroborative evidence creates doubts in the prosecution case.

12. PW1 - Chabutai, the sister of the deceased has narrated in her evidence, the entire incident. She has

further stated in her cross-examination as under:

"Said Shankar Jagannath Phalke was one of the person who beat my brother Ravindra - Later on I came to know from son of Panditbai that, one Sanjay Nalavade, Balu Tate and Shankar Jagannath Phalke were among the persons who bet my brother Ravindra. Even today I do not know why my brother Ravindra was assaulted by those persons."

"After return from Pune I was told by P.S.I. Mohite and his subordinate to take the name of accused Shankar only as the assailant of Ravindra and not to take names of other assailants. It is true that my statement was recorded by Police on 27.7.88 for the first time. My statement was recorded by P.S.I. Mohite. It is true that I came to know from my brother Ravindra the names of other assailants like Shankar Jagannath Phalke, Balu Tate, Sanjay Nalavade, Panditbai and her son were amongst the persons who assaulted my brother Ravindra."

The brother of the deceased - Ramchandra (PW6) also corroborated as under :

"He told me that he knew the names of assailants of my brother Ravindra and asked me not to involve him, Ravindra Pandit told me that my brother Ravindra was assaulted by Sanjay Nalavade, Balu Tate, Nandu Mali, Balu Ballal and Sanjay Bhise in the house of Panditbai. P.W.5 Balu is the same Balu Ballal."

PW3 - Shivaji has also made reference that *"The Police advised us to involve accused Shankar only and do not involve the other assailants of Ravindra."* This also shows lacuna and/or suppression of various other facts on the record by the prosecution. It also raises

various doubts in the prosecution case. The evidence of these witnesses, therefore, in no way supports the alleged dying declaration of the deceased (Exh.32). It also does not support the Report, based upon which the crime was registered (Exh.36). These infirmities and contradictions and variance of material facts remained unexplained.

13. This also dislinks the prosecution's case to connect the accused with the crime in absence of earlier incidence or events and reason and motive for the accused to commit the crime in question. The evidence of these witnesses narrate earlier incidents and reasons for quarrel, but surprisingly, the same events were missing even in the dying declaration of the deceased (Exh.32). Therefore, these omissions and contradictions, in the facts and circumstances of the case, dislinks the prosecution case.

14. The narration of lifting and throwing the deceased by the accused itself raises doubts in view of the above testimony of the witnesses. The stones, which were seized from the scene of offence, were not blood stained. The earlier scuffle between the deceased with others, as narrated by PW3 and PW1 also raises doubts about the theory of lifting and throwing of Ravindra by

the accused.

15. The testimony of PW1 and PW3 that the Police advised them not to involve others and only to involve Shankar cannot be ruled out for want of proper explanation or justification by the prosecution. The statements of these basic witnesses were recorded quite late. Balu Ballal (PW5), who claimed to be the eye witness, in his cross-examination stated that his statement was recorded on 29th July, 1988. He has further stated that till then, he did not inform the Police about this incident. He has admitted that he was near the house of Panditbai from 6.00 p.m. to 6.15 p.m. and thereafter went to his friend Kamatkar. He also admits that he made improvement in his statement about throwing of Ravindra by the accused on the stone. As rightly observed by the learned Judge, the presence of this witness at the relevant time was, therefore, doubtful. PW10 - Dilip Jadhav, another eye witness stated that the incident took place between 6.30 p.m. to 7.00 p.m. This witness was unable to tell the reason for the quarrel. This witness has also admitted that there were many persons, including Chabutai, Shankar and Ravindra, who were present at the relevant time. This witness has stated that the accused lifted Ravindra and threw him on the compound of that house. He further

stated that there were about 30 to 40 people who had surrounded the accused and the deceased at the time of the quarrel. The prosecution's case of involvement of the accused and no one else, based on the testimony of this independent witness, therefore, is difficult to be accepted. In the present case, considering the twisting of various statements in the testimony of the prosecution witnesses, apart from contradictions and omissions, we decline to interfere with the order of acquittal.

16. For the reasons stated above, we are of the view that the dying declaration (Exh.32), in the facts and circumstances of the case, raises various doubts in

its contents. It is difficult to act upon the same independently. There is no corroboration to the said dying declaration in the present case. There are contradictions, omissions and infirmities of facts and events. Therefore, it is difficult to accept the said dying declaration (Exh.32). The testimony of the other eye witnesses also raises various doubts for want of corroboration. The prosecution, according to us also, failed to prove beyond reasonable doubt, that it is the appellant and no one else who had committed the crime in question. The decision given by the learned Judge, on the facts and circumstances of the case, is correct. There is no perversity at all.

17. The impugned order of acquittal is confirmed.

The Appeal is dismissed. The Bail Bonds are cancelled.

[S.S. PARKAR, J.]

[ANOOP V. MOHTA, J.]

[srpasha@hc]